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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 148

REMINGTON RAND INC., *Intervenor-Petitioner,*

against

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

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INDEX.

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute and rules involved	3
Statement	5
Reasons for granting writ	8
Conclusion	22

CITATIONS.

CASES:

Arnold v. *U. S.*, 263 U. S. 427	10
Bills of Exceptions, In re, 37 F. 2d 849	22
Brown v. *Piper*, 91 U. S. 37	11
Bruckman v. *Hollzer*, 152 F. 2d 730	9
Canister Co. v. *National Can Corp.*, 3 F.R.D. 279	10
Chisholm v. *Cissel*, 12 App. D. C. 180	21, 22
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U. S. 541	18
Container Co. v. *Carpenter Container Corp.*, 9 F.R.D. 89	9
David v. *District of Columbia*, 187 F. 2d 204	8, 20
Dickinson v. *Petroleum Conversion Corporation*, 338 U. S. 507	9, 18, 20
Duke Power Co. v. *Greenwood County*, 299 U. S. 259	12
Etten v. *Kauffman*, 179 F. 2d 302	19, 20
Flegenheimer v. *Manitoba Sugar Co.*, 182 F. 2d 742	19, 20
Goldsmith v. *Valentine*, 35 App. D. C. 299	22
Heitmuller v. *Stokes*, 256 U. S. 359	21
Holland Banking Co. v. *Continental Nat. Bank*, 9 F. Supp. 988	11
Kaufman & Ruderman Inc. v. *Cohn & Rosenberger*, 177 F. 2d 849	19, 21
Leong Kim Wai v. *Burnett*, 23 F. 2d 789	11
Michigan Insurance Bank v. *Eldred*, 143 U. S. 293	22
Miller v. *American Bonding Co.*, 257 U. S. 304	10
Radio Corp. of America v. *Federal Trade Commission*, 71 S. Ct. 806	12
Rickenbacher Transp. v. *Penn. R. Co.*, 3 F.R.D. 202	10
Rivkin, In re, D. C. Conn. 216 F. 218, 222	11
Robinson Brothers and C. Inc. v. *Tygart Steel Products Co.*, 184 F. 2d 534	20

Page

Roemer v. *Simon*, 91 U. S. 149 21
Rothschild v. *Marshall*, 51 F. 2d 897 22
Shokuwan Shimabukuro v. *Higeyoshi Nagayama*, 140 F. 2d 13 .....8, 16
Southern Shipyard Corp. v. *The Tugboat Summitt, Inc.*, 294 F. 284 11
U. S. v. *Quick*, 128 F. 2d 832 .....8, 13
U. S. v. *Riccardi*, 174 F. 2d 883 .....8, 16
U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 236 .. 15
Waters v. *Kings County Trust Co.*, 144 F. 2d 680, certiorari denied 323 U. S. 769; rehearing denied 323 U. S. 817 .....8, 13
Willard Helburn Inc. v. *Spiewak*, 180 F. 2d 480 17
Winsor v. *Daumit*, 179 F. 2d 475 19

STATUTES:

Shop book rule, 28 U. S. C., Sec. 1732 .....3, 9, 13
Trading with the Enemy Act. Sec. 9, 50 U. S. C. App., Sec. 9 5

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 42(b) *Separate Trials* 8, 9, 10
Rule 43(a) *Evidence: Form and admissibility* 3, 8, 12, 17
Rule 54(b) *Judgment upon Multiple Claims* ..2, 3, 7, 8, 9, 10, 17, 18, 19, 20
Rule 60(a) *Clerical Mistakes* 3, 8, 21

MISCELLANEOUS:

Appendix 23
Docket entries in trial court 23-27
Hearings before the subcommittee on Appropriations, House of Representatives, subcommittee on the Department of Justice, (1951) pp. 10, 15 11
3 Barron & Holtzoff, *Federal Practice and Procedure*, Sec. 943 .....9, 10
Sec. 1193 18
Clark, Experience under the Amendments to the Federal Rules of Civil Procedure, 1950 18
Wigmore, *Evidence* (3d Ed.)
Sec. 734 15
Sec. 738 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Remington Rand Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia entered in the above entitled cause March 29, 1951. (R. 403).

OPINIONS BELOW

The decision of the Court of Appeals (R. 400) is not reported. The memorandum of the trial court (R. 26) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should exercise its power of supervision over the Court of Appeals for sanctioning departures from the usual and accepted course of judicial procedure—

a. In affirming the judgment and thereby approving the trial court's *sua sponte* order summarily requiring an immediate and separate trial of intervenor's claim which never would have required trial if plaintiff should fail in the main action as yet untried? (R. 396)

b. In not correcting the trial court for basing its order for separate trial upon unproved, unfounded, scandalous and impertinent suggestions of counsel that the property involved was "perishable" and that intervenor had "filed something in the nature of a strike suit"? (R. 396)

c. In accepting jurisdiction despite the fact that, without leave of the appellate court, the trial court entered a *nunc pro tunc* order in a belated effort to comply with Rule 54(b) of the Federal Rules of Civil Procedure five months after the appeal was perfected? (R. 413-414).

d. In misstating the record and erroneously assuming (1) that the judgment appealed from was final; (2) that the trial court properly amended its judgment when in fact it had lost jurisdiction by reason of the appeal (R. 400); (3) that the trial of the main action awaited the outcome of this appeal (R. 400); (4) that the trial court's findings of fact, which were contrary to conclusive and uncontradicted

written and oral evidence, were not clearly erroneous; and (5) that other erroneous rulings in excluding and admitting evidence were harmless? (R. 402).

2. Whether the decision of the Court of Appeals affirming the judgment and thereby approving the exclusion by the trial court of the Wehrli Memorandum is (a) in conflict with decisions of other Courts of Appeals on the same matter; (b) contrary to 28 U. S. Code, Sec. 1732; and (c) in disregard of Rule 43(a)?

3. Whether a judgment dismissing a complaint in intervention can become final only by compliance with Rule 54(b); and whether this Court should settle this hitherto unanswered and crucial question of Federal law which is causing conflict among the courts of appeals and hardship to litigants?

4. Whether the trial court, after appeal, in violation of Rule 60(a) and without leave of the appellate court, had jurisdiction to enter its *nunc pro tunc* order correcting its judgment in an effort to make it final; and whether the decision below, accepting jurisdiction to review the judgment, is in conflict with decisions of other courts of appeals?

STATUTES AND RULES INVOLVED

28 U.S.C. § 1732 provides:

> Sec. 1732. Record made in regular course of business.
>
> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945.

Rule 42(b) of the Federal Rules of Civil Procedure provides:

(b) SEPARATE TRIALS. The court in furtherance of convenience and to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or any separate issue or of any number of claims, cross-claims, third-party claims, or issues.

Rule 43(a) provides:

(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the general courts of general jurisdiction of the state in which the United States Court is held. In any case, the *statute or rule which favors the reception of the evidence* governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner. (Emphasis supplied.)

Rule 54(b) provides:

(b) JUDGMENT UPON MULTIPLE CLAIMS When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an

express direction for the entry of judgment. In the absence of such determination and direction, *any order or other form of decision, however designated,* which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. (Emphasis supplied.)

Rule 60(a) provides:

(a) CLERICAL MISTAKES: Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected *with leave of the appellate court.* (Emphasis supplied.)

STATEMENT

This action was brought by the respondent, Societe Internationale Pour Participations Industrielles et Commerciales, S.A., Etc., hereinafter referred to as Interhandel, under Section 9 of the Trading With the Enemy Act (50 U.S.C. App. Sec. 9) to recover certain vested property including more than 90 per cent of the stock of General Aniline and Film Corporation, hereinafter referred to as GAF.

Petitioner was permitted to intervene in that proceeding to establish its right to purchase the GAF stock from Interhandel for the sum of 25 million dollars cash, if, as and when Interhandel recovered the stock and other assets claimed by it.

Both Interhandel and the Office of Alien Property opposed petitioner's intervention and sought to force this petitioner out of the case by numerous dilatory and harassing tactics, including a petition for a writ of prohibition,

which was denied, and an appeal, which was dismissed on motion.[1]

These tactics included unwarranted assertions that the property of GAF was "perishable" and that "Intervenor had filed something in the nature of a strike suit". (R. 396). These induced the trial court *sua sponte* to sever the intervenor's claim and set it down for immediate trial before answers had been filed either to the complaint of intervenor or to the main suit.

Petitioner was allowed scant time to prepare for a trial involving intricate questions of Swiss law, the translation of numerous exhibits, including Interhandel's corporate minutes and the taking of depositions both here and abroad. The trial began on February 6, 1950, and concluded March 28, 1950. In mid-trial the court granted a recess in order that depositions might be taken in Paris.

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[1] These included the following:

July 25, 1949, Leave granted to file complaint in intervention (Orig. R. 2091) but entry of order deferred 10 days to permit application to Court of Appeals for writ of prohibition (Orig. R. 2105).

Aug. 3, Petition for writ of prohibition filed. (Orig. R. 2091). See intervenor's memorandum (Orig. R. 2090-2098).

Aug. 16, 1949, Writ of Prohibition denied by Court of Appeals (Orig. R. 2092).

Oct. 26, 1949, Motion of Office of Alien Property for order that defendants and plaintiffs are entitled to settle action regardless of right which intervenor has or asserts to contrary (R. 393).

Dec. 14, 1949, Motion to dismiss complaint in intervention (Orig. R. 2110).

Dec. 21, 1949, Motion denied (R. 394).

Dec. 30, 1949, Office of Alien Property moved orally for a rehearing (Orig. R. 2127).

Jan. 4, 1950, The Office of Alien Property filed a written motion for a "reconsideration" which was denied Jan. 18, 1950. (R. 398.) The defendants appealed to the Court of Appeals (C. A. No. 10650) but their appeal was dismissed on petitioner's motion.

Jan. 18, Motion to dismiss complaint in intervention (Orig. R. 2140).

Jan. 23, 1951, Mandate of Oct. 30, 1950, from U. S. C. A. dismissing appeal on order of Dec. 21, 1949; filed. (Docket Entry App. p. 27 post.)

In the course of the trial the intervenor introduced numerous written exhibits, Nos. 1-55 (R. 319-391), in order to prove the existence of an oral contract, valid under the law of Switzerland, where it was made.

Intervenor's Exhibit No. 17 A.A. (R. 334) is from the minutes of a two-day meeting of Interhandel's Board of Directors and is devoted entirely to a discussion of the matter of making a binding offer to the intervenor for the sale of GAF shares.

These minutes of May 18 furnish the background as well as the authority for Interhandel's binding offer of June 6, 1946, to sell its GAF shares to petitioner for $25,000,000 (R. 336, 337).

Negotiations followed. The intervenor made a counter-proposal (R. 337) to accept the offer at a price of twenty-five million dollars ($25,000,000). This counter-proposal the Board of Interhandel found acceptable (R. 337).

After many conferences Interhandel, on June 6, 1946, made its binding oral offer or declaration, the conclusive written evidence of which is the Wehrli memorandum. (Intervenor's Ex. 55, R. 391). The trial court refused to admit this memorandum in evidence (Orig. R. 2318). Dr. Ulrich Wehlri is an official of the Union Bank of Switzerland (R. 148) which represented intervenor in Interhandel conferences (R. 150). His immediate superior in the bank was Mr. F. Richner, general manager (R. 148). It was Richner's regular and invariable practice to require his assistants to furnish him with a memorandum made in the regular course of the business of the Union Bank of Switzerland. (R. 146, folio 991, 992) (Orig. R. 2278, 2281). The memorandum was a true and accurate account of what was said at the conference of June 6, 1946 (R. 147).

This offer was accepted May 5, 1947 by the Remington-Rand group (R. 326-327) before the time limit fixed by Interhandel's notice of April 21, 1947 had expired.

The trial judge in announcing his decision requested counsel to prepare findings of fact and conclusions of law and judgment. (R. 26). Those submitted by counsel for

Interhandel were adopted *verbatim* and almost *in toto* (R. 31-37).

The trial court rendered judgment dismissing the petitioner's complaint in intervention (R. 37-38) but made no direction under Rule 54(b) for the entry of final judgment and no express determination that there is no just reason for delay. Nevertheless petitioner appealed (Orig. R. 2347; docket entry, App. p. 26, docket entry).

The trial court, after the case was set for argument in the appellate court, entered a *nunc pro tunc* order on January 4, 1951, (R. 413-414) endeavoring thereby to make final its judgment of April 26, 1950.

The appellate court in affirming the judgment not only ignored these errors but misread the record, as shown by its misstatements of the facts when it said:

> Entry of the judgment was directed upon an express determination by the court that there was no just reason for delay (Fed. R. Civ. P., 54(b)).[2] The main action yet untried awaits the outcome of this appeal (R. 400).

REASONS FOR GRANTING THE WRIT

The decision below is erroneous. It violates Rules 42(b). 43(a), 54(b) and 60(a) of the Federal Rules of Civil Procedure. It is in direct conflict with the decisions of the Second Circuit in *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680; *cert. denied* 323 U. S. 769; *rehearing denied* 323 U. S. 817, and of the Third Circuit in *U. S.* v. *Quick*, 128 F. 2d 832, and *U. S.* v. *Riccardi*, 174 F. 2d 883. Nor can the decision here be reconciled with the court's own holdings in *David* v. *District of Columbia*, 187 F. 2d 204, and *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama*, 140 F. 2d 13.

In addition, the affirmance of the judgment so far sanctioned such departures by the District Court from the usual and accepted course of judicial proceedings as to call for the exercise of the supervisory power of this Court.

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[2] This statement is completely inaccurate unless this Court should find that the *nunc pro tunc* order of the trial court was within that court's power.

The case also presents important questions of federal law, one of which involves the construction and proper application of 28 U.S.C. Sec. 1732, "record made in regular course of business", which has not been but should be decided by this Court.

Another involves the question whether a judgment dismissing a complaint in intervention is final and appealable absent compliance with Rule 54(b). This question was left unsettled by this Court in *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507. This court should resolve the doubt and uncertainty that still impedes the administration of justice in intervention proceedings.

I.

A. The trial court of its own motion prematurely ordered an immediate, separate trial of intervenor's claim for relief. Proper procedure required a separate trial only in the event that plaintiff should prevail in the main action. Interhandel of course cannot deliver to petitioner shares of GAF held by the Office of Alien Property until Interhandel's right to the return of those shares is established in this action. Therefore there was no purpose to be served by the trial court's order.

Rule 42(b) of the Federal Rules of Civil Procedure provides:

> "The court *in furtherance of convenience or to avoid prejudice* may order a separate trial of * * * any separate issue or any number of claims * * * or issues." (Emphasis supplied.)

The rule is intended to further convenience and avoid delay[3] and to serve the ends of justice.[4]

"If a separate trial of part of the issues may make unnecessary the trial of other issues, it is only reasonable to

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[3] 3 Barron & Holtzoff, *Federal Practice and Procedure,* Sec. 943, p. 664; *Bruckman* v. *Hollzer,* 152 F. 2d 730.

[4] *Container Co.* v. *Carpenter Container Corp.,* 9 F. R. D. 89.

follow the course which saves the time of the court and reduces the expense of the parties.'"[5] This Court has said that the separate trial of issues should be ordered only in exceptional instances where there are special and persuasive reasons for departing from the usual practice of trying all issues of a case at one time.[6]

In the case at bar the trial court might well have served convenience, saved expense and avoided prejudice by postponing the trial of intervenor's claim until after the trial of the main action. Then, if the court rejected Interhandel's claim for the return of the GAF shares, intervenor's claim would never have come to trial. But the trial court, ignoring this clearly marked path, of its own motion, chose another course. It ordered a separate and immediate trial of the intervention issues. Thus, Rule 42(b) was misused to produce precisely the consequences which the rule seeks to avoid, namely, delay and inconvenience to all parties and serious prejudice to the intervenor.

This initial departure from sound procedure set in motion a chain of bizarre events which, as will be seen, involved the trial and appeal in a labyrinth of error. Without a separate trial of issues there would have been no separate judgment; no occasion for an express finding of "no just reason for delay" under Rule 54(b); no appeal; no makeshift *nunc pro tunc* order; and no question of jurisdiction.

B. The District Court's order for a separate trial was prompted by suggestions of counsel that the GAF property required immediate protection "from deterioration or loss" and that intervenor "had filed something in the nature of a strike suit." (R. 396). The latter suggestion is a gratuitous slander entirely unsupported by the record. The other suggestion, that the property needed immediate

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[5] 3 Barron & Holtzoff, Sec. 943, p. 665; *Canister Co.* v. *National Can Corp.*, 3 F. R. D. 279; *Rickenbacher Transp.* v. *Pennsylvania R. Co.*, 3 F. R. D. 202.

[6] *Arnold* v. *U. S.*, for use of W. B. Guimarin & Co., 263 U. S. 427; *Miller* v. *American Bonding Co.*, 257 U. S. 304.

protection, is contrary to fact. GAF then, as now, was being successfully and profitably operated by a management selected and instructed by the Office of Alien Property.[7] It is important that a District Court should not act upon mere suggestion or surmise. A court acts upon evidence, not upon guesswork or suspicion engendered by unsupported and unfounded statements of counsel.

A trial is a judicial examination and determination of the issues. Where the facts must be proved or submitted to the Court, the judge cannot assume facts not generally known, and in this regard cannot go further than a jury. *Brown* v. *Piper*, 91 U. S. 37; *Leong Kim Wai* v. *Burnett*, 23 F. 2d 789; *In re Rivkin*, 216 F. 218, 222. See also *Southern Shipyard Corporation* v. *The Tugboat Summitt, Inc.*, 294 F. 284; *Holland Banking Co.* v. *Continental Nat. Bank*, 9 F. Supp. 988.

C. The trial court without leave of the Court of Appeals entered its *nunc pro tunc* order (R. 413-414) amending the record five months after the appeal had been taken and eleven days before it was argued.

This order was the exercise of a power beyond the jurisdiction of the trial court. The appeal had taken away the District Court's jurisdiction. Sole jurisdiction of the case resided in the appellate court. This is too obvious to war-

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[7] The Attorney General of the United States testifying before a subcommittee of the House Committee on Appropriations, on February 19, 1951, said in part, "This is the largest company that Alien Property has and is operating. We think the value of the property can run anywhere from $60 million to $100 million. The Government ought to dispose of the property as soon as it can. It should be put back into private hands." (Hearings before the subcommittee on Appropriations, House of Representatives, subcommittee on the Department of Justice (1951, pp. 10, 15.)

Again in his testimony he said, "I would not hesitate to recommend some type of settlement" (p. 12). * * * "I anticipate that the net profits of the company for the year 1950 will be in the neighborhood of $5 million—$5 to $6 million (pp. 12, 18, 19). The picture is continually improving but it is improving because of the defense program and it can be expected to go the other way when this program is behind us." (p. 12).

rant extended discussion. The point will be treated briefly in subdivision IV, p. 21, post.

D. The court below misread the record and erroneously assumed (1) that the judgment was final; (2) that the *nunc pro tunc* order was proper; (3) that the trial of the main action waits upon the outcome of this appeal (R. 401); (4) that other rulings excluding evidence were harmless (R. 402).

The error in deeming the judgment final is discussed in subdivision III (p. 17, post); the *nunc pro tunc* order in subdivision IV (p. 21, post); the error in excluding the Wehrli memorandum in subdivision II immediately following.

More is unnecessary to demonstrate that the Court of Appeals in affirming the judgment departed from the usual and accepted course of judicial proceedings and so far sanctioned such departures by the District Court as to call for the exercise of the supervisory power of this Court. See *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259; *Radio Corp. of America* v. *Federal Trade Commission,* 71 S. Ct. 806.

In the case at bar, as in *Duke Power Co.* v. *Greenwood County, supra,* "the climax of misunderstanding was reached. * * * We thus have a situation in which both courts have failed to act in accordance with the standards of proper procedure." *Id.* p. 267.

"Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced." *Id.* p. 267.

II.

The Decision of the Court of Appeals approving rulings of the trial court which excluded evidence vital to the issues is in conflict with the decisions of other courts of appeals on the same matter; is contrary to Rule 43(a) of the Fed-

eral Rules of Civil Procedure; and involves an important question of Federal law which has not been but should be settled by this court.

This discussion will be limited to the Wehrli memorandum (Ex. 55, R. 391-3) which is convincing and conclusive evidence of the terms and conditions of the oral contract upon which petitioner relies. This the trial court excluded (Orig. R. 1035). This the Court of Appeals held harmless, if error (R. 403). The memorandum was made in the regular course of business (R. 146) at the express direction of Mr. Richner, General Manager of the Union Bank of Switzerland and pursuant to his invariable rule to require his assistant, Dr. Ulrich Wehrli, to report conferences attended (R. 153). The memorandum was prepared within a day or two following the conference of June 6, 1950 (R. 152), and therefore was admissible as proof of the facts recorded for two reasons.

1. It fully meets the requirements of 28 U.S.C. 1732, commonly known as the "shop book rule".

2. It was a true and accurate memorandum recording the past recollection of the witness and, therefore, if not in all respects fulfilling the conditions of admissibility under the "shop book rule", was admissible as "past recollection recorded".

This memorandum was indeed not unlike the documentary evidence held admissible in *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680, *certiorari* denied, 323 U. S. 769, *rehearing denied*, 323 U. S. 817.

The only prerequisite to the admissibility of a writing under 28 U.S.C. Sec. 1732 is that the entries must have been made in the usual course of business as the record of acts or transactions then occurring. *U. S.* v. *Quick*, 128 F. 2d 832.

Therefore we submit that the exclusion of this evidence was error and the holding of the court below that if error, it was harmless, is in conflict with the decisions of the sec-

ond and third circuits. It also should be noted that the question of the proper construction of 28 U.S.C. Sec. 1732 involves an important question of federal law which has not been but should be decided by this Court.

Before discussing the second reason or principle upon which the Wehrli memorandum is admissible, a brief recapitulation of its evidentiary background may be helpful.

Petitioner claims the right to purchase the GAF shares under an oral contract which is valid under the law of Switzerland (R. 107). The terms and conditions of this contract are reflected in two documents: (1) the minutes of Interhandel's Board of Directors authorizing the June 1946 offer (R. 336-337), and (2) the Wehrli memorandum of the conference of June 6, 1946 at which the proposal was made (R. 391-393). These were the significant and controlling documents with respect to the terms and conditions of the contract.

Oral evidence at the trial, four years after the event, was directed to the interpretation of the agreement; or to its intended scope and effect; or to the acts and conduct of the parties which might disclose either that the contract was not entered into or that its conditions were conditions precedent and were not performed. No evidence in the record contradicts the factual integrity of the Wehrli memorandum. Its circumstantial trustworthiness is convincing. The deposition of Richner (R. 147) that it was a true and accurate record of the facts recorded likewise stands uncontradicted.

Consequently the exclusion of this memorandum could not possibly be harmless error.

We have shown, we think, that it was admissible under the "shop book rule" as a record made, kept and required to be made and kept in the regular course of the business of the Union Bank of Switzerland. But if by any technical shortcoming it could be excluded under that rule, it should have been received as the truthful and accurate record of the facts of the conference made by the recorder within a

day or two after the conference (R. 152, 153) when the events were fresh in his mind.

We cannot expect a busy bank officer, four years later, to accurately remember all the details of the conferences attended. This was an important conference. Dr. Wehrli testified, "I wanted to be precisely sure what was said on that date in order to communicate it to the Remington Rand group" (R. 154). The truthfulness of the memorandum is admitted by Interhandel's general manager, Germann, who was asked by the trial court (R. 251):

> Is this (memorandum) an accurate summary or statement of Interhandel's declaration to Mr. Richner and Dr. Wehrli on June 6, 1946 * * * ?
> The witness: Yes, Your Honor. * * *

What tribunal would hesitate under these circumstances to impute verity to such a memorandum? Who in later years would prefer the uncertain and fallible recollection of a witness to his written record made at the time of the event?

Wigmore notes that historically there has been much confusion in the decisions with respect to the admission or rejection of a contemporaneous memorandum made by a witness as a record of past recollection (3 Wigmore on Evidence, 3d Ed. 1940, Sec. 734, p. 64). He then discusses the practical requirement that the record must have been made at about the time of the events recorded and the tests of accuracy and identity that should be applied.

"The principle on which the use of a past recollection rests * * * is clearly that of necessity. To reject such a record would be to reject the best and frequently the only means of arriving at the truth!" (Wigmore Sec. 738)

This Court in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 236, indicated accord with Professor Wigmore's views with respect to past recollection recorded and cited section 761 of his work.

The holding of the Court below is squarely in conflict with *U. S.* v. *Riccardi,* C.A. 3d 1949, 174 F. 2d 883. In the *Riccardi* case the opinion carefully distinguishes between "present recollection revived or refreshed," and "past recollection recorded." There a witness was permitted to refresh her recollection by using a memorandum of the items of property which the accused was charged to have stolen. Only one sheet of the original notes was available and the witness was permitted to testify that she had made a typewritten copy of the longhand notes as to the numerous items stolen from her house, and one page of longhand notes was admitted in evidence. The court said in part:

> Since the purpose of the writing is to activate the memory of the witness, there is always the possibility, if not probability, that the writing will exert a strong influence upon the direction of the memory, that is, the nearer the writing to the truth the lesser the deviation of the witness' memory from the truth. (p. 888.)

In the *Riccardi* case the third circuit approved the ruling of the District Court admitting the evidence and receiving into the record the sheet of longhand notes. In the case at bar, the court below approved the ruling of the trial court excluding the evidence. Not only does the decision of the Court below conflict with the *Riccardi* decision, but it is squarely in conflict with its own decision in *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama,* App. D. C. 1944, 140 F. 2d 13. There the circumstances were quite comparable. The witness testified that he had no present recollection of the facts at the time of the trial but that he knew that the memorandum was true when he made it. The court said:

> * * * But the rule as to admissibility of books of account does not apply to a case where the witness who made the entry testifies that he had no present recollection of the facts they are offered to prove, but that he knows the entries were true when he made them. This is a form of past recollection recorded *and is admissible as such.* (p. 16.) (Emphasis supplied.)

Rule 43(a) provides that "the statute or rule which favors the reception of the evidence governs." By promulgating this rule, this Court established a more liberal rule than theretofore obtained. Technical rules are no longer effective to exclude trustworthy evidence if there is any sound rule or reason for its admission.

Willard Helburn Inc. v. *Spiewak,* 180 F. 2d 480, involved a letter written by plaintiff's treasurer to defendant, appellee. The letter confirmed a telephone call, and reported the purchase of sheepskins for appellee. The District Court admitted the letter but considered it simply a self serving declaration not binding on defendant. The Court of Appeals for the Second Circuit reversed the trial court for not accepting the memorandum "as a timely written memorandum stating to the appellee the appellant's understanding of the oral contract they had made." (p. 482).

We submit, therefore, that the exclusion of the Wehrli memorandum violated Rule 43(a) and was contrary to 28 U.S.C. Sec. 1732. The court below accepted and approved an obsolescent and outmoded rule and disregarded the modern and salutary trend.

III.

The decision below in other respects is in conflict with decisions of other United States courts of appeals and involves an important question of federal law which has not been but should be settled by this Court.

The amendment of Rule 54(b) of the Federal Rules of Civil Procedure became effective March 19, 1948. This rule fixes the standard by which the finality and appealability of a judgment is determined when that judgment decides one or more but less than all of the issues of a case.

The rule is clear and precise. If the judgment is to be final, the court must do two things: (1) it must make an express determination that there is no just reason for delay, and (2) it must make an express direction for the entry of judgment. In the absence of such determination and

direction any order or other form of decision does not determine the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.[8]

As this Court said in *Dickinson* v. *Petroleum Conversion Corp.*, (1950) 338 U. S. 507, the obvious purpose of this amendment "is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here. It provides an opportunity for litigants to obtain from the District Court a clear statement of what that Court is intending with reference to finality, and if such direction is denied, the litigant can at least protect himself accordingly."

In the *Dickinson* case, *supra*, the judgment was rendered before the effective date of Rule 54(b). The amended rule, therefore, was not applicable. This Court in holding that a judgment dismissing a complaint in intervention was final and appealable, after noting the effect of the amended rule on future cases, carefully limited its opinion to the particular case then under consideration.

Thus was left undecided an important question of federal law which has not been but should be settled by this Court. The courts, the Bar, and litigants in federal courts should not be left in doubt that the requirements of Rule 54(b) apply to separate judgments dismissing complaints in intervention.

Circuit Judge Charles E. Clark, reporter to the Advisory Committee on the rules, makes this plain:[8a]

> While this decision, (Cohen v. Beneficial Indus. Loan Corp., 337 U. S. 541) considered alone, still leaves the important matter of appealability in too much uncertainty for the comfort of counsel forced to take imme-

[8] 3 Barron & Holtzoff, *Federal Practice and Procedure*, Sec. 1193, p. 16.

[8a] Clark, Experience Under the Amendments to the Federal Rules of Civil Procedure, 1950, Revised Edition, Pamphlet, Federal Rules of Civil Procedure and New Title 28, U. S. Code, pp. 20, 21. See also, *id.*, p. 8.

diate actions, yet it does suggest a way out, indeed the very way taken by the amendment to Rule 54(b); it is perhaps regrettable that the Court did not seize the opportunity to clarify the situation by pointing out the interconnection. For that amendment (to Rule 54(b)) builds on the same underlying thesis as does the decision, but with the added purpose of affording counsel some principle or presumption upon which they can act without too great peril. Under it a court order short of a judgment terminating all aspects of the litigation is held interlocutory and subject to revision by the judge unless he has made an express direction for the entry of a final judgment upon a part of the litigation accompanied by an express determination that there is no just reason for delay as to it. This does not, as has at times been suggested,[55] put in the hands of the trial judge any improper or additional power; it simply guarantees that his existing powers will be exercised not inadvertently or by default, but openly to the gaze of all who are interested. And it gives scope for the proper operation of the undoubtedly equitable Cohen principle in a way which does not leave the parties in hopeless uncertainty.[56]

Judge Clark added this footnote:

Since the district court was always entitled to hold its order subject to review until the entry of a final judgment, this simply states a method of interpretation of an otherwise ambiguous order. Except in the one instance where a district judge has erroneously determined that there is no just reason for delaying the entry of a final judgment as to some obviously interlocutory matter, there would thus seem no possibility of question as to the district court's acts.

The decision below, which assumed that the trial court's judgment dismissing the complaint in intervention was final and appealable, is in conflict with the decisions in *Flegenheimer* v. *Manitoba Sugar Co.*, C.A. 2d, 1950, 182 F. 2d 742; *Etten* v. *Kauffman*, C.A. 3d, 1950, 179 F. 2d 302; *Winsor* v. *Daumit*, C.A. 7th, 1950, 179 F. 2d 475; and *Kauf-*

man and Ruderman Inc. v. *Cohn & Rosenberger,* C.A. 2d, 1949, 177 F. 2d 849.

The case of *Flegenheimer* v. *Manitoba, supra,* decided that an order dismissing a third-party claim was not final and appealable.

The *Etten* v. *Kaufman* and *Winsor* v. *Daumit* cases, as well as *Robinson Brothers and Co. Inc.* v. *Tygart Steel Products Co.,* C.A. 3, 1950, 184 F. 2d 534, all held that compliance with the requirements of Rule 54(b) was an indispensable prerequisite to the jurisdiction of the appellate court. For lack of such compliance the appeal was dismissed in each of these cases.

Furthermore the decision of the court below is squarely in conflict with its own holding in *David* v. *District of Columbia,* C.A. D.C. 1950, 187 F. 2d 204. There the court on its own motion held that an order of the trial court dismissing a third-party complaint was not final or appealable in the absence of an express finding of no just reason for delay. This case was decided after the decision of this Court in the *Dickinson* case. The contrary holding in the case at bar is the more perplexing because one Circuit Judge participated in both decisions of the Court of Appeals.[9]

In the instant case, the Court below devoted one solid hour to hearing argument on the question of its jurisdiction (R. 399) and then made no further reference to the question but assumed that the judgment was final and that jurisdiction existed (R. 400).

This conflict, we submit, should be resolved by this Court, and the Court below reassured that a separate order or judgment dismissing a third-party claim or complaint in intervention, is not final and is appealable only upon the trial court taking the two steps required by Rule 54(b).

Here the petitioner, uncertain as to the finality of the judgment entered after premature trial, appealed, although

[9] In the case at bar the appeal was heard by Circuit Judges Edgerton, Proctor and Fahey. The appeal in *David* v. *District of Columbia* was heard by Circuit Judges Clark, Bazelon and Fahey.

the trial court had failed to take the steps required by the rule.

IV.

The final question here presented is related to the question last discussed. In the case at bar the trial court made no finding of "no just reason for delay" when the judgment was rendered. (R. 37-38). Five months later, after the appeal had been taken and was ready to be argued, the trial court entered a *nunc pro tunc* order making a finding that there was "no just reason for delay." (R. 413-414).

We submit that under Rule 60(a) the trial court, without leave of the appellate court, had no power to amend its judgment by making the finding that there was no just reason for delay.

Such an order in essence was but an attempt to give to the Court of Appeals jurisdiction where otherwise no jurisdiction existed. The Court of Appeals by its decision accepted the regularity of the order, assumed that the judgment was final (R. 400), and thereby gave sanction and validity to the *nunc pro tunc* order.

The decision of the Court below is in conflict with the decisions of other courts of appeals and probably in conflict with the applicable decisions of this Court.

This Court in *Heitmuller* v. *Stokes*, 256 U. S. 359, held that a court is without jurisdiction to take any further action with respect to its judgment after an appeal therefrom has been perfected. In *Roemer* v. *Simon*, 91 U. S. 149, this Court said that the proper practice is to apply for remand of the record for further proceedings in the trial court.

This is the procedure which this Court has prescribed by Rule 60(a) for just such occasions. *Kaufman & Ruderman Inc.* v. *Cohn & Rosenberger*, C.A. 2d 1949, 177 F. 2d 849.

Upon the taking of the appeal, all power and control over the right to prosecute an appeal terminate so far as the trial court is concerned. *Chisholm* v. *Cissel*, 12 App.

D.C. 180; *Goldsmith* v. *Valentine*, 35 App. D.C. 299; *Rothschild* v. *Marshall*, 51 F. 2d 897. The trial court's jurisdiction cannot be restored by a *nunc pro tunc* order. *In re Bills of Exceptions*, 37 F. 2d 849; *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293.

Therefore the decision of the Court below is in conflict with the applicable decisions of this Court; in conflict with the decisions of other courts of appeals; and in conflict with its own former decisions.

CONCLUSION.

The opinion of the Court below fails to disclose the want of jurisdiction in that Court or in the district court. It fails to reflect its own departures from the usual and accepted course of judicial proceedings, or those departures by the trial court which the judgment of affirmance sanctioned. We recognize the fact that this Court reviews decisions and not opinions. We suggest, however, that this Court will not permit its power of review to be circumscribed by failure of the opinion to chart its errancies or those of the trial court to which it gave approval by affirmance.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:

URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

APPENDIX.

Partial Statement of Docket Entries in District Court.[1]

PROCEEDINGS.

1949

May 19 Motion of Remington Rand, Inc. for leave to intervene; P & A; app. Homer Cummings, J. Edw. Burroughs, Jr. and Frank C. Sterck; Served 5/19/49 M.C. 5/19/49

June 17 Memo. filed specially by pltff. in opposition to Motion of Remington Rand for leave to Intervene; mailed 6-17-49

17 Deft. memo. in opposition to motion of Remington Rand to intervene; served 5/17

21 Memo. of pltff. in opposition to motion that deposition be not taken etc.; mailed 6/20/49

July 22 Supplemental memo of Remington Rand, Inc., in support of motion to intervene, personally 7/22/49

23 Supplemental memo of defts. in opposition to motion of Remington Rand, Inc. for leave to intervene, served 7/22/49

Oct. 18 Order granting motion of Remington Rand, Inc. for leave to intervene and file a complt. herein. Holtzoff, J. (N)

18 Intervening petition of Remington Rand, Inc. App. of Cummings, Stanley, Truitt & Cross, J. Edward Burroughs, Jr. & Frank C. Sterck. Filed

25 Motion of defts. for order that defts. & pltf. are entitled to settle action regardless of right which intervenor has or asserts to contrary; served 10-24-49; P & A's; M.C. 10-25-49, filed

25 Stipulation of defts. & Remington Rand, Inc. extending time for Remington Rand, Inc. to file its P & A's in opposition to deft's. motion of 10-25-49 to & including 11-5-49. filed

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[1] This Appendix includes only those docket entries which reflect proceedings affecting the intervention proceedings. A certified statement of all docket entries, complete to April 4, 1951, has been filed with the Clerk of this Court.

26 Certified copy of order of U.S.C.A. ordering that the effectiveness of Order of Intervention be stayed to and including 10-25-49. filed

Nov. 4 Memo of intervenor pltf. in opposition to deft's. motion of 10-25-49; exhibits (2). filed

8 Memo of intervenor in opposition to motion of deft's. to dismiss complt.; mailed 11-8-49. filed

Dec. 7 Supplemental memo of deft. in support of motion for an order that pltf. & defts. are entitled to settle action, etc.; per. served 12-6-49. filed

15 Motion of pltf. to dismiss complt. of intervention and/or motion to strike matter therefrom; served 12-14-49; memo in support; M.C. 12-15-49. filed

16 Stipulation between I. G. Chemie & Remington Rand extending time within which intervenor may answer pltf's. motion to dismiss complt. of intervention, etc. to and including Jan. 5, 1950. filed

16 Affidavit of David Schwartz in support of motion of defts. for order adjudging that pltfs. & defts. are entitled to settle action, regardless of right of intervenor; service accepted 12-16-49. filed

21 Official transcript of proceedings (7-25-49) filed

21 Answer of intervenor pltf. to statement of David Schwartz on behalf of deft. filed

21 Order denying motion of defts. for an order adjudging defts. & pltfs. are entitled to settle this action regardless of any rights intervenor has or asserts to the contrary. Pine, J. (N)

27 Stipulation extending time to plead to complt. in intervention to Jan. 16, 1950. (Fiat) Letts, J. (N)

1950

Jan. 3 Notice by pltf. to intervenor of taking oral deposition; service accepted 1-3-50

4 Motion of defts. for reconsideration of deft's motion for declaratory relief; P & A; exhibit; M.C. 1-4-50 filed

5 Memo of intervenor in opposition to motion of pltf. to dismiss complt. of intervention or to strike matter therefrom; mailed 1-4-50

Jan. 9 Reply by pltf. in support of motion to dismiss complt. of intervention, etc.; mailed 1-7-50 filed
9 Answer of plfts. to motion for reconsideration of defts. motion for declaratory relief; mailed 1-9-50.
11 Transcript of proceedings on motion to dismiss intervening petition. filed
13 Notice of intervenor to take oral deposition of pltf; mailed 1-13-50 filed
16 Motion of pltf. to compel intervenor to proceed with deposition & to quash notice of intervenor to take oral deposition; P & A. filed
18 Order denying motion of pltf. to dismiss complt. of intervention and/or motion to strike. Pine, J. (N)
18 Order denying motion of deft. for reconsideration of motion for declaratory relief. Pine, J. (N)
24 Answer of defts. #1 & 2 to complt. for intervention; served 1-24-50 (N)
31 Notice by Remington Rand of taking deposition of F. Rickner; Dr. U. Wehrli & Roy Archibald; mailed 1-31-50.

Feb. 6 Motion of intervenor for permission to take depositions; P&A; affidavit; exhibit; mailed 2-4-50.
7 Hearing on intervening petition of Rem. Rand, vol. 1, pp. 1-139. filed
9 Order permitting suspension of trial for one week to permit taking of deposition. Pine, J.
10 Hearing resumed; testimony; respited until 10:00 A.M. Monday. Pine, J.
17 Telegram from Frank Sterck re: inability to arrive for deposition. filed
27 Hearing resumed; testimony; respited until 10:00 A.M. March 15, 1950. Pine, J. (N)

Mar. 4 Copy of radiogram from Donald Hiss & Frank Sterck to John R. Wood dated 2-28-50. filed
4 Copy of stipulation by Frank Sterck & Donald Hiss dated 3-3-50. filed
13 Acknowledgment by witnesses, U. Wehrli & F. Richner of examining their depositions & find no changes needed; also same statement by Roy Archibald. filed

13 Depositions of R. Archibald, U. Wehrli & F. Richner on behalf of Remington-Rand; cost ($843.50); published & filed
17 Hearing resumed & respited until March 20 at 10:00 A.M. Pine, J.
23 Hearing resumed; testimony; respited until 10:00 A.M. tomorrow Pine, J.

Mar. 23 Hearing resumed; testimony; respited until 10:00 A.M. Monday. Pine, J.
23 Order extending time for filing record on appeal & docketing same. Pine, J.
28 Hearing resumed; arguments; taken under advisement. Pine, J.
31 Memo opinion (Findings of Fact & Conclusions of Law & Judgment to be presented.) Pine, J.

Apr. 4 Transcript of proceedings on intervening petition of Remington Rand Inc., 2-10-50. * * *
14 Motion of Remington Rand, Inc. for leave to file an amended complt; P&A; notice, mailed 4-14-50; exhibit.
17 Amended Complt. for intervention, granted. (Fiat) Pine, J.
26 Suggested Findings in behalf of Intervenor, Remington Rand. filed
26 Answer of Pltf. to amended complt. of Intervention; Serv. 4-17-50. filed.
26 Answer of Dfts. to amended complt. of Intervention; Serv. 4-26-50. filed.
26 Findings of Fact & Conclusions of Law. Pine, J. (N)
26 Judgment dismissing complt. of Intervention of Remington Rand. Pine, J. (N)

June 23 Notice of Appeal by Remington Rand, Intervenor from order of 4-26-50 dismissing complt.; mailed 6-22-50 filed

July 10 Designation of Record on appeal by Intervenor; mailed 7-10-50 filed
15 Counterdesignation of record by Pltf; Serv. 7-14-50. filed.
18 Counterdesignation of record by Dfts. (Appellees); mailed 7-18-50

19 Statement of Points by appellants; mailed 7-19-50 filed.
19 Designation of Record; mailed 7-19-50 filed.
20 Supplemental designation of record filed.
20 Motion of Intervenor pltf. for an order allowing transmittal of original papers & exhibits to Court of Appeals, P/A filed
21 Order directing Clerk of Court to forward to U. S. Court of Appeals the originals of all papers and exhibits listed in paragraphs 6 & 7 of Intervenor pltf's Designation of Record, etc. Tamm, J. (N)
28 Joint counter-designation of Record on appeal; mailed 7-28-50 filed.

Aug. 1 Transcript of Record of Appeal delivered to J. Edward Burroughs filed

1951

Jan. 3 Appearance of William P. MacCracken, Jr.; atty for Intervenor; filed
4 Motion of pltf. for order nunc pro tunc that no reason for delay P&A; mailed 1-3-51 filed
4 Supplemental designation of record of pltff. (Appellee)
4 P & A in opposition to motion for nunc pro tunc order, by intervenor pltff., Wm. P. MacCracken, Jr.; serv. ackn. 1-4-51;
4 Order on motion, nunc pro tunc; Ordered that determination of no just reason for delay be formally entered of record; effective as of April 26, 1950; Pine, J.
23 Mandate of Oct. 30, 1950 dismissing appeal on order of Dec. 21, 1949; filed

IN THE

Supreme Court of the United States

October Term, 1951.

No. 148.

SIDNEY KAYN INC., *Intervenor-Petitioner*,

against

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. etc. (In sequestri), *Plaintiff-Respondent*,

and

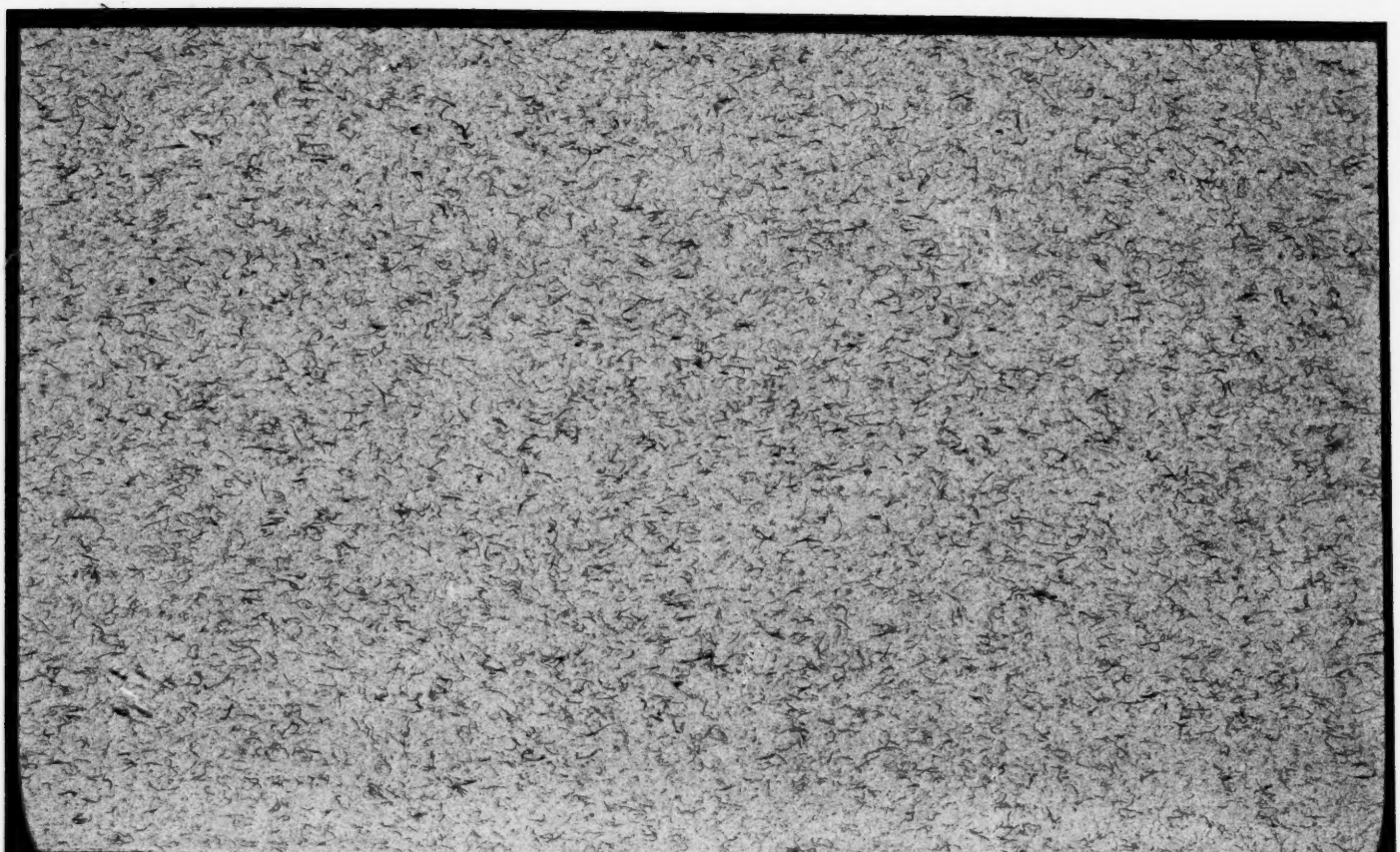
J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGE MAURY ORAM, Treasurer of the United States, *Defendants-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PLAINTIFF-RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. etc. (In sequestri), IN OPPOSITION.

JOHN J. WILSON,
DONALD HISS,
JOHN H. HARRIS,
Attorneys for Plaintiff-Respondent.

Press of Byron S. Adams, Washington, D. C.



INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rules involved	2
Statement	3
Argument	13
I. Separate Trial	13
II. Rule 54(b)	15
III. Evidentiary Ruling	17
Conclusion	19

CITATIONS.

CASES:

Collins v. *Metro Goldwyn Pictures Corp.*, 106 F. 2d 83, 87 (2d Cir., 1939) 13
David v. *District of Columbia*, 187 F. 2d 204 (D. C. Cir., Dec. 14, 1950) 10, 15, 17
DeWitt v. *Skinner*, 232 Fed. 443, 444 (8th Cir., 1916) 19
Frazier v. *United States*, 335 U. S. 497, 514 (1948) .. 13
Graver Manufacturing Co. v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949) 14
Gunning v. *Cooley*, 58 App. D. C. 304, 306, 30 F. 2d 467, 469 (D. C. Cir., 1929), aff'd 281 U. S. 90 (1930) 19
Helvering v. *Minnesota Tea Co.*, 296 U. S. 378, 380 (1935) 13
Kaufman & Ruderman, Inc. v. *Cohn & Rosenberger*, 177 F. 2d 849 (2d Cir., 1949) 16, 17
New York Life Insurance Co. v. *Taylor*, 147 F. 2d 297, 303, 306 (D. C. Cir., 1945) 18
Palmer v. *Hoffmann*, 318 U. S. 109 (1943) 18
Shippers Pre-Cooling Service v. *Marks*, 181 F. 2d 510, cert. denied 340 U. S. 816 (5th Cir., 1950) 13

Page

Shokuwan Shimabukuro v. *Higeyoshi Nagayama,* 140 F. 2d 13 (D. C. Cir., 1944) 19
Stockyards Loan Co. v. *Nichols,* 260 Fed. 393, 394 (8th Cir., 1919) 19
Stone v. *Metzler,* 68 App. D. C. 359, 360, 98 F. 2d 231, 232 (D. C. Cir., 1938) 19
Tyrrell v. *District of Columbia,* 243 U. S. 1, 5-6 (1917) 13
U. S. v. *Quick,* 128 F. 2d 832 (3d Cir., 1942) 19
U. S. v. *Riccardi,* 174 F. 2d 883 (3d Cir., 1949) 19
Vale v. *Bennett,* 15 F. Rules Serv. 54.b.4, Case 6, decided June 7, 1951, D. C. Cir. 17
Vicksburg & Meridian R. R. v. *O'Brien,* 119 U. S. 99, 102 (1886) 19
Waters v. *Kings County Trust Co.,* 144 F. 2d 680 cert. denied 323 U. S. 769, rehearing denied 323 U. S. 817 (2d Cir., 1944) 19
Willard Helburn Inc. v. *Spiewak,* 180 F. 2d 480 (2d Cir., 1950) 19

STATUTES:

Shop book rule, 28 U. S. C. Sec. 1732 17
Trading with the Enemy Act, Sec. 9(a), 50 U. S. C. A. App. Sec. 9(a) 4

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 42(b) *Separate Trials* 7, 13
Rule 54(b) *Judgment upon Multiple Claims* 2, 8, 10, 11, 12, 13, 15, 16
Rule 60(a) *Clerical Mistakes* 16
Rule 61 *Harmless Error* 2, 12, 18
Rule 75(h) *Power of Court to Correct or Modify Record* 3, 16

MISCELLANEOUS:

3 Jones, *Evidence* Sec. 883 (4th ed., 1938) 19
3 Moore, *Federal Practice* 3051 (1938 ed.) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 148.

REMINGTON RAND INC., *Intervenor-Petitioner,*

against

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. ETC. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PLAINTIFF-RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. (Interhandel), IN OPPOSITION.

OPINIONS BELOW

The United States District Court for the District of Columbia wrote a memorandum opinion (R. 26) which is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 400) is at 188 F. 2d 1011.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the District Court abused its discretion in setting down for trial petitioner's complaint of intervention prior to final disposition of the main case involving plaintiff-respondent's claim for the return of property vested by the Alien Property Custodian. (R. 396)

2. Whether there was compliance with Rule 54(b) of the Federal Rules of Civil Procedure. (R. 394-396; 408-410; 413, 414)

3. Whether the Court of Appeals acted properly in concluding that the District Court's ruling excluding the Wehrli memorandum did not constitute error and "certainly none which appeared to be 'inconsistent with substantial justice' ". (R. 400, 402)

STATUTES AND RULES INVOLVED

All statutes and the Federal Rules of Civil Procedure, 28 U.S.C. Sec. 723c et seq., deemed particularly pertinent here are given in the Petition (pp. 3-5) except for the following:

Rule 61 provides:

> **Harmless Error.** No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard

any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 75(h) provides:

> **(h) Power of Court to Correct or Modify Record.** It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

STATEMENT.

This litigation is limited to the dismissal, after trial on the merits, of petitioner's amended complaint of intervention (R. 5).

The main action instituted on October 21, 1948, by plaintiff-respondent, Societe Internationale Pour Participations Industrielles et Commerciales, S. A. Etc. (Interhandel), a Swiss corporation, hereinafter referred to as Interhandel (Orig. R. 2005), is still pending in the District Court. In the main action Interhandel sued the Attorney General and

the Treasurer of the United States under section 9(a) of the Trading with the Enemy Act, 50 U.S.C.A. App. Sec. 9(a), for the return of certain shares of stock of General Aniline & Film Corporation (GAF) and other assets which had been vested by the Alien Property Custodian in 1942 and 1943 and are now held by the Attorney General as successor to the Custodian. (Orig. R. 2005)

On May 19, 1949, Remington Rand, the petitioner, filed a motion seeking leave to file a complaint of intervention.* On October 18, 1949, the motion was granted and the complaint filed (R. 2). After completion of trial on the merits, this was supplanted by an amended complaint (R. 5).

In the amended complaint Remington Rand asserted contingent rights to the vested GAF shares resulting from an oral declaration** made by Interhandel on June 6, 1946. According to Remington Rand, the terms of the declaration provided that should Remington Rand, before the specified expiration date, submit an offer*** promising to pay $25,000,000 to Interhandel for the vested GAF shares, Interhandel would thereby become firmly obligated to deliver such shares to petitioner if at any time in the future the vested shares and other property were returned to Interhandel and if certain discriminatory treatment by the United States was eliminated. On May 5, 1947, which

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* A partial statement of docket entries in the District Court, including those mentioned here, is contained in the Appendix to the Petition, pp. 23-27.

** The oral declaration was also referred to by other terms. For example, the word "option" was used by two of petitioner's witnesses (R. 134, 137, 144); the District Court referred to it as "an oral statement or offer" (R. 31, 32); the Court of Appeals used the term "declaration" (R. 400, 401). In this brief it will be referred to as a "declaration".

*** Here again different phrases appear in the record to describe Remington Rand's contemplated response to Interhandel's declaration. Petitioner's complaint used the phrase "offer to purchase" (R. 7); the District Court used the same phrase in its Findings (R. 31), and the word "acceptance" in its Conclusions (R. 36); the Court of Appeals used the word "offer" (R. 401). In this brief the word "offer" is used.

was prior to the ultimate date of termination of the declaration, Remington Rand submitted an offer to purchase the vested GAF shares at the stipulated price and maintained that it was willing and able to perform its part of the agreement upon delivery by Interhandel of the shares. Remington Rand then charged that Interhandel refused to recognize its obligations under this agreement and intended to dispose of its rights and interest in the GAF shares in disregard of such agreement. Remington Rand prayed for a judgment declaring it to be entitled to the GAF shares when the conditions were fulfilled and for an injunction restraining Interhandel from disposing of its rights or interest in the shares (R. 5-8).

Interhandel denied the existence of a legally binding agreement. Its answer asserted that the declaration constituted a "gentlemen's agreement" which was not legally enforceable under Swiss law, which controlled. Interhandel alternatively claimed that its June, 1946, declaration provided that an offer of Remington Rand to purchase the GAF shares for $25,000,000 would give rise to a legally binding agreement *only if before* the specified expiration date the shares were returned to Interhandel by the United States authorities, other vested property restored, and the discriminations eliminated. In other words, all of these conditions were conditions precedent in that, unless they were fully satisfied prior to the expiration date, no binding agreement would come into being even though Remington Rand should submit an offer to purchase the shares prior to that date. (R. 8-19, 25). The expiration date originally specified in the declaration was extended several times. Ultimately Interhandel stipulated that the declaration would run indefinitely, subject to cancellation upon Interhandel's giving fifteen days notice. Such notice was given on April 21, 1947. The termination date therefore was fixed at May 6, 1947. The conditions precedent have not been satisfied, as was admitted by petitioner (R. 286).

Accordingly, Remington Rand's alleged offer of May 5, 1947, was ineffectual. (R. 8-19, 25)*

Upon completion of the trial a memorandum opinion was filed by the District Court stating that petitioner, the intervenor there, had "failed to establish, by a preponderance of the evidence, the basic element of its claim, namely, the existence of the agreement between itself and plaintiff [Interhandel] on which it relies and as particularly described in the complaint of intervention and pre-trial statement; and having failed in this regard, it is not entitled to the relief prayed." (R. 26) Thereafter the District Court filed its findings and conclusions. It specifically found that the conditions contained in the declaration of June, 1946, were conditions precedent, i.e., that the GAF shares had to be returned to Interhandel and the other conditions fulfilled before the termination date (R. 31, 32). Interhandel having given fifteen days notice on April 21, 1947, the termination date of May 6, 1947, was thus established. (R. 31, 33) It was conceded by petitioner that the shares had not been returned and that the other conditions had not been satisfied on that date or even at the time of trial (R. 286).

On the basis of these facts, the trial court concluded that, as a matter of law, the offer of Remington Rand became ineffectual on May 6, 1947, the termination date (R. 36).

The District Court also found that Interhandel's declaration was intended to be a "gentleman's agreement" and that under the law of Switzerland it gave rise to no enforceable rights. (R. 31, 35) Being unenforceable under the law of Switzerland, the place where Interhandel's declaration and Remington Rand's offer were made, the

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* Additional independent defenses were advanced by Interhandel, some of which were sustained by the District Court, some rejected. Inasmuch as the Court of Appeals considered it unnecessary to consider these additional defenses in order to affirm the judgment of the lower court, these defenses are not discussed here.

agreement would not be enforced in the District Court (R. 36).*

Judgment was accordingly entered dismissing the complaint of intervention (R. 37, 38). Remington Rand thereupon took appropriate, timely and unequivocal steps to obtain review by the Court of Appeals for the District of Columbia Circuit.** In its brief submitted to the appellate court petitioner contended that the findings of fact below were clearly erroneous and complained of certain evidentiary rulings.

If Remington Rand in its petition had continued to adhere to its position on the merits and had confined itself to the points set forth in its brief filed with the Court of Appeals, we could in this statement now proceed in an orderly manner to examine the disposition of this case on appeal. An examination of other parts of the record not relevant to the merits or the rulings on evidence would be unnecessary. Remington Rand, however, has now abandoned its contention that it should prevail on the merits and in its petition advances two technical points which were not mentioned in its brief.

Petitioner *now* attacks the District Court's order which set the intervention case down for trial separately and without waiting for completion of trial of the main case, notwithstanding petitioner's failure to object at the time the court took such action or to urge reversal on this ground in the appellate court. Petitioner's present position is that the court's discretion under Rule 42(b) of the Federal Rules of Civil Procedure was "misused". (Pet. 2, 9, 10 and 11).

Petitioner's second point is that the Court of Appeals lacked jurisdiction in this case. The determination of no

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* Additional findings and conclusions in support of the contentions of Interhandel are not discussed for reasons set forth in the footnote on page 6, *supra*.

** Notice of appeal was duly filed on June 23, 1950. Transcript of the record on appeal was filed on August 1, 1950. (Pet. 26, 27)

just reason for delay required by Rule 54(b), Remington Rand now asserts, had not been made while the case was pending before the District Court and was not remedied by the *nunc pro tunc* order which the District Court entered on January 4, 1951, after the appeal had been perfected (R. 413, 414).*

A proper understanding of these new issues now raised by Remington Rand requires us at this stage to interrupt a strictly chronological statement of the case and revert to developments in the District Court in connection with pre-trial and post-trial motions as such developments appear in the record.

Prior to the filing of answers to the complaint of intervention, the Attorney General and the Treasurer of the United States moved for an order "adjudging that defendants [the Attorney General and the Treasurer of the United States] and the plaintiff [Interhandel] are entitled to stipulate for the settlement and dismissal with prejudice of the cause of action herein asserted by the plaintiff against defendants regardless of any right which the intervenor-plaintiff has or asserts to the contrary." (R. 393)

The motion was denied on December 21, 1949, and on the same date the intervention case was set down for trial on January 30, 1950. The District Court filed a memorandum opinion explaining its reasons for this action (R. 394). According to the opinion, in support of the Attorney General's motion, it had been asserted that "great damage may be done to this property if an early disposition is not made of this [the intervention] case." (R. 394, 396)

The opinion further points out that, in the course of the argument on the motion, the court had been "told" that the property was "in the nature of being perishable" and

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* It is noted that Remington Rand in attacking the appellate court's jurisdiction is now taking a position diametrically opposed to the position which it maintained as appellant in perfecting the appeal and in urging the Court of Appeals to reverse the District Court.

the court had "got the suggestion" that Remington Rand, the intervenor, had filed "something in the nature of a strike-suit" (R. 394, 396). Thus the Court found itself in what it termed a "dilemma". To grant the motion without trial on the merits of the complaint of intervention would have disregarded the rights of the intervenor, Remington Rand. To deny the motion without further action would have disregarded the desires of the plaintiff (Interhandel), and defendant (the Attorney General), to settle the main case; would have failed to protect the property "from deterioration or loss"; and would have interfered "with the Government's program" (R. 396). This dilemma was heightened by the "suggestion" which had been made to the Court that "the intervenor had filed something in the nature of a strike suit." (R. 396). The Court extricated itself from this dilemma by denying the motion and setting down the case of intervention for trial on January 30, 1950, more than six weeks thereafter; more than eight months after May 19, 1949, when Remington Rand had filed its motion for leave to intervene; more than sixteen months after October 21, 1948, when the complaint was filed in the main case; and nearly three years after May 5, 1947, when petitioner contends its agreement with Interhandel to buy the GAF shares became effective.*

The Attorney General opposed the order and asked for reconsideration of his motion for declaratory relief (R. 396). Petitioner remained silent then but now, in its petition, asserts for the first time that the lower court erred in setting the intervention case down for separate and early trial. (Pet. 2, 9, 10, 11). In denying the motion for reconsideration the Court again explained its reasons for ordering a separate and early trial of the intervention litigation in the following manner:

> "I should like to file a written opinion if there were ample time to do so, but in my effort to protect the

* Yet petitioner now claims in its statement that it "was allowed scant time to prepare for" the trial. (Pet. 6).

rights of the plaintiff and the defendants and also safeguard the rights of the intervenor I have set this case down for trial, on January 30.'"*

With respect to the jurisdictional issue, now being raised by petitioner (Pet. 2, 3, 11, 12, 17-22), developments connected with a post-trial motion are relevant. On January 4, 1951, a motion was filed with the District Court by Interhandel seeking the entry of a *nunc pro tunc* order. To be sure, the appeal had been perfected by that time but the record is equally clear that prior to that date there was no indication that any party was uncertain as to the finality of the judgment dismissing the complaint of intervention.** The purpose of such a proposed order was fully explained in Interhandel's points and authorities in support of its motion (R. 409-410). In December, 1950, the Court of Appeals had decided *David* v. *District of Columbia,* 187 F. 2d 204. In that case the court, *sua sponte,* raised the issue of Rule 54(b), and dismissed the appeal for failure to comply with the rule. The opinion indicated that, in an appeal involving Rule 54(b) the lower court should have made a formal determination of record in the exact words of the rule "that there is no just reason for delay."

In the instant case the District Court had affirmatively determined that there were reasons for advancing the case for trial and for determining with finality petitioner's rights of intervention before proceeding with the trial of the main case. This is made clear in the District Court's memorandum opinion denying the Attorney General's motion for declaratory judgment entitling Interhandel and

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* This quotation from Judge Pine's oral opinion denying the motion for reconsideration is found in the points and authorities in support of Interhandel's motion for an order *nunc pro tunc.* (R. 409, 410)

** Petitioner, without any reference to the record, or further documentation, now cavalierly asserts that it was uncertain as to the finality of the judgment and its right to appeal (Pet. 20).

the Attorney General to carry out their desires to settle the main case regardless of petitioner's interests and setting January 30, 1950, as the trial date for the intervention case (R. 394-396). This point was reiterated in the subsequent oral opinion of the District Court denying the Attorney General's motion for reconsideration. (R. 409, 410) But the negative words of the rule—"there is no just reason for delay"—had not been made a matter of formal record. To eliminate all possible doubts and to make doubly sure that Remington Rand's appeal would be decided on the merits and not on a technicality, Interhandel, even though appellee, filed its motion with the District Court seeking a *nunc pro tunc* order which would use the exact negative words contained in Rule 54(b).

Although petitioner was the appellant in the Court of Appeals, it opposed Interhandel's motion (R. 411, 412). However, the motion was granted and an order entered, effective April 26, 1950, in which Judge Pine observed that he had "expressly determined prior to and at the time of the entry of final judgment herein that there was no just reason for delay . . ." He then "ordered that this determination of no just reason for delay be hereby formally entered of record, effective as of the 26th day of April 1950." (R. 413, 414)

On January 15, 1950, the appeal was argued before the Court of Appeals (R. 399). The question of jurisdiction involving Rule 54(b) was raised at the outset by the Court, (R. 399) and argued at length. Interhandel maintained that the Rule had been satisfied by the determinations of the lower court at the time the case was set for trial and at other times in the course of the trial. Interhandel further asserted that all doubts on this score were eliminated by the *nunc pro tunc* order (R. 413, 414). Petitioner took a contrary position, asserting that the rule had not been complied with, and continued to attack the validity of the *nunc pro tunc* order.

Argument was then heard on the assertions of Remington Rand that the lower court's findings of fact were clear-

ly erroneous and that it had erred in certain evidentiary rulings.

Thus petitioner before the Court of Appeals in January, 1950, maintained completely inconsistent positions. At the start of the argument the Court was told by petitioner that it lacked jurisdiction and was asked to disregard petitioner's brief and to rule that the appeal was premature until the litigation in the main case had been completed. In the next breath the Court was told by petitioner that it had jurisdiction and was asked to adopt petitioner's brief and to reverse the District Court on the merits.

On March 29, 1951, the Court of Appeals rendered a unanimous decision affirming the lower court (R. 400). It was noted that Rule 54(b) had been fully satisfied and the court did not consider any further discussion of the matter necessary. (R. 400)

On the two "fundamental" or "vital" issues of fact, whether the arrangement between the parties was a "gentlemen's agreement" and, alternatively, whether the conditions were conditions precedent it was concluded that the findings below were not clearly erroneous and therefore could not be set aside. Moreover, the opinion went further and added the following:

> "On the contrary, in our opinion the findings of the trial judge are abundantly supported by substantial evidence and should not be set aside." (R. 400, 402)

With respect to Remington Rand's complaint as to certain rulings concerning the admission and exclusion of evidence, including the exclusion of the Wehrli memorandum, the Court of Appeals said:

> "These we have considered and find no error—certainly none which appear to be 'inconsistent with substantial justice.' Fed. R. Civ. P., 61." (R. 400, 402).

The judgment of the District Court was therefore affirmed.

Two courts having rejected its claim on the merits, petitioner, recognizing it has no substantive case, now aban-

dons this avenue and relies on (1) Rule 54(b), (2) a wholly new procedural point, and (3) an evidentiary point. Notwithstanding Remington Rand's record in this case, petitioner takes sharp issue with the suggestion made to the trial court that "the intervenor [petitioner here] had filed something in the nature of a strike suit." (R. 396) This suggestion is characterized by petitioner as "a gratuitous slander entirely unsupported by the record." (Pet. 10) In the light of the record, the strike suit suggestion appears now to be an understatement.

ARGUMENT.

I.

Separate Trial.

Petitioner attacks the action of the District Court in ordering a separate trial of the intervention complaint without waiting for the completion of the trial of the main case. This is given as one of three reasons for granting certiorari, petitioner now contending that in taking such action Rule 42(b) "was misused" by the District Court (Pet. 10).

Petitioner failed to object at the time the lower court ordered a separate trial and failed to urge the Court of Appeals to reverse on this ground. Hence petitioner is not entitled to raise the point for the first time at this stage of the proceedings. *Frazier* v. *United States,* 335 U. S. 497, 514; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380; *Tyrrell* v. *District of Columbia,* 243 U. S. 1, 5-6.

Even if petitioner had saved its rights by timely exception, there is no merit to the point now being advanced by petitioner. There is agreement in the circuit courts that review by the intermediate courts of an order allowing separate trial is permissible only if there was an abuse of discretion.* Cases cited by petitioner are not in conflict.

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* *Shippers Pre-Cooling Service* v. *Marks,* 181 F. 2d 510, cert. denied 340 U. S. 816 (5th Cir. 1950); *Collins* v. *Metro Goldwyn Pictures Corp.,* 106 F. 2d 83, 87 (2d Cir. 1939).

The exercise of discretion by a trial court is governed by the facts. Being governed by the facts a trial court's exercise of discretion, when affirmed on appeal, is not of sufficient importance for review by this Court, absent an obvious and exceptional showing of abuse. *Graver Manufacturing Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. Here a mere reading of the complaints which are summarized in the statement at pages 3-5, *supra,* establishes the wisdom of the District Court in ordering a separate trial.

Interhandel's complaint in the main case and Remington Rand's complaint in the intervention case involve definitely diverse claims.* The former concerns the right of Interhandel to the return of the GAF shares which the APC vested as being enemy-owned; the latter concerned Remington Rand's alleged private contract rights with Interhandel.**

Moreover, the record shows that there were additional reasons which motivated the lower court. The Attorney General wanted to be free to settle the main case with Interhandel and thereby protect the property "from deterioration" and further the "Government's program."***

A settlement between the parties in the main case would avoid the expense of a costly and time-consuming trial and thus further the convenience of the Attorney General, Interhandel and the Courts. Remington Rand's complaint, however, prevented such a settlement. If its claim was sound a settlement without its approval would have jeopardized its legitimate interests, as the lower court pointed out (R. 394, 395, 396). If the complaint was lacking in merit, as was found to be the case, then the intervention litigation was "in the nature of a strike suit" (R. 394, 396).

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* This alone is sufficient to justify separate trials. See 3 Moore, *Federal Practice* 3051 (1938 ed.).

** The main case is still in the deposition and discovery stage before a special master.

*** See Attorney General's motion for declaratory judgment (R. 393), his motion for reconsideration (R. 396, 397). See also Judge Pine's memorandum opinion (R. 394, 396).

Under these circumstances, separate trials were inevitable and one complaint had to be tried in advance of the other. With the parties in the main case desirous of terminating the litigation by settlement, the only reasonable solution was to order early trial of the intervention complaint which involved relatively simple issues of fact.

Thus it is seen that there is no possible foundation for charging abuse of discretion.

II.

Rule 54(b).

Petitioner contends that a determination of "no just reason for delay" was not made before the entry of judgment, with the result that under Rule 54(b) the judgment was not final and the appeal premature (Pet. 2, 3, 11, 12, 17-22).*

On January 4, 1951, when the appeal was pending, the District Court entered a *nunc pro tunc* order, effective April 26, 1951, the date the judgment was entered (R. 413, 414). The order was in response to Interhandel's motion (R. 408) filed after the Court of Appeals' decision in *David* v. *District of Columbia*, 187 F. 2d 204 (D. C. Cir., Dec. 14, 1950). In that case the Court, on its own motion, dismissed the appeal because the record failed to show that the lower court had made a determination of no just reason for delay. The language of the opinion made it "conceivable that Rule 54(b) could be deemed applicable" to the instant case so as to result in the appeal being dismissed on a procedural point and not disposed of on the merits. (R. 409, 410) This would have run counter to the trial court's wishes for an early and final adjudication of the merits of petitioner's complaint. (R. 394-396)

At the start of argument on appeal, the court raised the

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* Petitioner also maintains that a further question is presented—whether a judgment in an intervention case is final without regard to Rule 54(b). Such a question is not raised in the instant case. Hence, subdivision III of petitioner's argument (Pet. 17-21) is irrelevant.

issue of Rule 54(b) (R. 399) and "devoted one solid hour to hearing argument on the question of its jurisdiction" (Pet. 20). In its opinion the court said:

> "Entry of the judgment was directed upon an express determination by the court that there was no just reason for delay [Fed. R. Civ. P., 54(b)]." (R. 400)

Under Rule 75(h) the District Court, without leave of the appellate court, had authority to enter the *nunc pro tunc* order. The order recites that the trial court had "expressly determined prior to and at the time of the entry of final judgment herein that there was no just reason for delay" and such determination was thereby "formally entered of record" (R. 413, 414). The record abundantly supports this recital of the lower court.*

The action of the District Court might therefore be interpreted as merely correcting an omission of the record which such a court may do, "either before or after the record is transmitted to the appellate court", under Rule 75(h), "on a proper suggestion or of its own initiative." The appellate court in approving the *nunc pro tunc* order, moreover, could be viewed as giving its "leave" to the District Court, in the form of ratification, to the correction of a clerical omission. [See Rule 60(a)]

The Court of Appeals did not specify whether it relied on one or both of the rules available.

In any event, there is no conflict in the decisions dealing with the propriety of using a *nunc pro tunc* order in this manner. The question has arisen in only one other circuit. *Kaufman & Ruderman* v. *Cohn & Rosenberger,* 177 F. 2d 849 (2nd Cir. 1949). In both circuits the use of a *nunc pro tunc* order to satisfy Rule 54(b) was sanctioned.

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* In denying the Attorney General's motions and in setting January 30, 1950 as the trial date, the Court made it clear that an early and final determination of petitioner's rights of intervention was essential "to protect the rights of the plaintiff and the defendants, and also safeguard the rights of the intervenor." (R. 394, 396, 398; 409)

In the *Kaufman* case an order, entered while the case was pending on appeal and after argument, was held to be proper; in the present case, an order, entered while the case was pending on appeal but before argument, was held to be proper. Thus in the holdings and in principle the cases are in agreement.

Unlike the *David* case cited by petitioner, the Court of Appeals, in the case at bar, was fully appraised of the trial judge's attitude toward the appealability of his judgment and there was no necessity to remand in order to ascertain such attitude.*

Furthermore, the course followed here was eminently sound. No useful purpose would be served by disapproving the *nunc pro tunc* order and dismissing the appeal. The District Court would have to hear a repetition of argument and repeat its action in entering another order determining no just reason for delay. The Court of Appeals would have to hear a repetition of argument and repeat its action in filing another opinion dismissing the case on the merits. Such a course would merely delay a final determination of the rights of the petitioner as intervenor below. Such delay would be detrimental to the interests of the Attorney General and Interhandel, without protecting the legitimate rights of the petitioner, and would unduly burden the lower courts.

III.

Evidentiary Ruling.

Petitioner maintains that the exclusion of the Wehrli memorandum conflicts with decisions of other circuits, and that the document should have been admitted either under the shop book rule, 28 U.S.C. Sec. 1732, or under the rule of past recollection recorded (Pet. 3, 12-17).

Even if petitioner's position on this point is sound, it is

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* Use of a *nunc pro tunc* order in order to comply with Rule 54(b) was examined again by the Court of Appeals for the District of Columbia Circuit and its approval reiterated. *Vale* v. *Bennett*, 15 F. Rules Serv. 54.b.4, Case 6, decided June 7, 1951, D. C. Cir.